No. 87-1727

IN THE

Court of the United States

OCTOBER TERM, 1987

EAT MARWICK MAIN & CO.,
Petitioner,

v.

THOMAS TEW,
ER FOR ESM GROUP, INC., *et al.*,
Respondent.

---

tion for a Wrt of Certiorari to the
ited States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

PHILIP A. LACOVARA
Counsel of Record
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

VICTOR M. EARLE, III
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

LLO
MAIN & CO.
reet
York 10055

Y, JR.
& DOWNS
Financial Center
yne Boulevard
33131-2395

TABLE

Cases

Rule

ITIES

IN THE

Supreme Court of the U

OCTOBER TERM, 198

No. 87-1727

PEAT MARWICK MAIN &

v.

THOMAS TEW,
RECEIVER FOR ESM GROUP,

On Petition for a Writ of Certi
United States Court of A
for the Eleventh Circ

REPLY BRIEF FOR THE P

The brief in opposition continues
has historically attended the first
clauses of Rule 60(b).

1. Respondent candidly concedes
deed" a conflict between the decisio
Eleventh Circuits (Br. in Opp. at
nevertheless urges the Court not t
cause in this case the Eleventh Cir

intrinsic dichotomy.[1] The Eleventh Circuit's decision thus is still another example of the long history of manipulated results that have been handed down in the name of finality. (*See* discussion in Pet. at 8-11.) This case, therefore, presents the conceded conflict over the test for the independent action to attack a tainted judgment.

2. Turning to the second branch of the Eleventh Circuit's opinion—in which it held that the conduct by ESM and its counsel in the suit against Peat Marwick did not constitute "fraud on the court" within the meaning of Rule 60(b)—respondent contends that "fraud upon the court" did not occur because Peat Marwick did not specifically allege *subornation* of perjury. Respondent does acknowledge, though, that the allegations against ESM's counsel included, among others, his *tendering* of perjured testimony (Br. in Opp. 3-4). Respondent omits that Peat Marwick alleged that ESM's counsel had acted "knowingly" in providing falsified material in discovery and in tendering perjured testimony (Pet. App. 28a). Thus, respondent is attempting to distinguish between "subornation" of perjury and knowingly tendering perjured testimony.

---

[1] The court also stated that, because the jury found Peat Marwick to have been negligent in its audit, it could not satisfy an additional element: having a good defense to the claim on which the judgment was rendered. As we have pointed out (Pet. at 11), however, Peat Marwick had specifically pleaded ESM's lack of reliance in the original proceeding (an essential element in an action for misrepresentation), and that the perjured testimony frustrated this defense. (*See* discussion in Pet. at 13, n.7.)

In addition, the court concluded that the finding in the malpractice action that Peat Marwick had been negligent in its audit disqualified it from satisfying the element of "absence of fault or negligence on the part of the defendant" (Pet. App. 5a). The nature of ESM's claim, however, obviously had nothing to do with the later diligence arguably necessary to pursue an independent action to vacate a judgment procured by fraud. (*See* discussion in Pet. at 11, n.5).

Suc
Florid
State,
It is
winni
civil
score
and t
is no
by P
rema
his o

Peat
late,
hors
perj
cour
of F
to th

O
app
157
sug
mo
jur
nic

3
tha
gui
is
neg
me

wick to ESM and to a murderer, arguing that ESM's misconduct does not establish that Peat Marwick itself acted properly in its audit. (Br. in Opp. at 6.) And, as we have pointed out, the Eleventh Circuit based part of its holding on Peat Marwick's negligent auditing.

This characterization begs the question. Peat Marwick is not seeking relief because ESM defrauded *others*. Rather, the issue is whether fraudulently concealing those facts during discovery and offering perjured testimony at the trial tainted the record on which the jury relied in finding *against* Peat Marwick. The jury might not have found against Peat Marwick if there had been no falsified evidence and perjured testimony.

Moreover, wholly apart from the question-begging implicit in this approach, it imposes an impossible burden on a party seeking relief under Rule 60(b). Under that line of reasoning, only a party who was successful in the original action would have standing to invoke the Rule, but by definition Rule 60(b) offers relief *only* to a party against whom a judgment—but a tainted judgment—has been rendered. That approach, of course, would satisfy the craving for finality, because there would be virtually no more claims for post-judgment relief. By granting review, this Court can make it clear that that is not what was intended in 1946 when Rule 60(b) was amended. At the same time, the Court can resolve the two important conflicts described in the petition.

The petition for a

LEONARD P. NOVELLO
General Counsel
PEAT MARWICK MAI
New York, New Yor

JAMES W. BEASLEY, JR.
BEASLEY, OLLE & Do
Miami, Florida 3313

May 27, 1988